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No. 94-52

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

KEVIN BLAKE, SEAN BROGAN, MARY KELLIHER, JOHN D. McCARTHY and MORTIMER O'SHEA,
Petitioners,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this civil action, certain discovery and evidentiary orders protecting the identities of non-testifying abortion clinic patients from disclosure to petitioners who had blockaded and invaded the clinics resulted in the denial of petitioners' right to a fair trial under the Due Process Clause.

2. Whether the permanent injunction, which bars petitioners from "trespassing on, blocking or in any way obstructing access" to abortion clinics, violates the First Amendment.

LIST OF PARTIES

The petitioners in these proceedings are Kevin Blake, Sean Brogan, Mary Kelliher, John D. McCarthy, and Mortimer O'Shea. The respondents are the Commonwealth of Massachusetts; Planned Parenthood League of Massachusetts, Inc.; Preterm, Inc.; Repro Associates, Inc.; Crittenton Hastings House; and Stanton P. Goldstein, M.D.

The parties to the proceedings before the Supreme Judicial Court of Massachusetts included the parties to this proceeding and fictitious plaintiff Rebecca Roe, as to whom the action was dismissed.

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On Petition For a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Commonwealth of Massachusetts (the "Commonwealth") submits this brief in opposition to the petition for writ of certiorari ("Pet.").

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (the "Supreme Judicial Court") is reported at 417 Mass. 467, 631 N.E.2d 985 (1994), and is reproduced at Appendix A to the petition. ("Pet. App.") The Amended Judgment of the Superior Court and the Amended Permanent Injunction were not reported and are reproduced at Pet. App. A.19-A.22 and A.23-A.24. In addition, the Superior Court issued a 150-page unreported decision. See appendix to petitioners' brief in the Supreme Judicial Court, volume II, pp. 397-546. (Hereinafter cites to the record will be designated "A., vol., p." and cites to the Superior Court decision, "d., A. vol., p.").

JURISDICTION

The opinion of the Supreme Judicial Court was entered on April 11, 1994. Pet. App. A.1. The petition was filed July 6, 1994 and received by the Commonwealth on July 7, 1994. The petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(a) (1988). The Commonwealth contends that this Court lacks jurisdiction over the second Question Presented because petitioners failed to preserve the issue adequately for review by this Court. Pursuant to Sup. Ct. R. 30.3, the time for filing this brief was extended until August 18, 1994.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action involves the Massachusetts Civil Rights Act (the "MCRA"), Mass. Gen. L. ch. 12, § § 11H, (1992), which provides, in pertinent part, as follows:

> **§11H Violations of constitutional rights; civil actions by attorney general; venue**
>
> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable

> relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.

In addition, the petition invokes the First and Fourteenth Amendments to the United States Constitution, which are accurately set forth in the petition. Pet. 2-3.

STATEMENT OF THE CASE

An accurate statement of the case appears at Pet. App. A.3-A.6 (opinion of the Supreme Judicial Court). The petition, however, mischaracterizes this public enforcement action and the discovery and evidentiary rulings at issue. As to those subjects, the Commonwealth states as follows.

In March, 1990, the Commonwealth of Massachusetts, through its Attorney

General, intervened in this civil action in response to a persistent, statewide campaign by petitioners, along with Operation Rescue: Boston and others, physically to prevent women from exercising their constitutional rights to obtain abortion counseling and services. A., I, 10; d., A, II, 399. In the Complaint for Injunctive Relief, the Attorney General asserted a single state law claim under Mass. Gen. L. ch. 12, § 11H (1992) against two organizational defendants -- Operation Rescue: Boston and the Pro-Life Action Network of Arlington ("P.L.A.N.") -- and numerous individual defendants, including the petitioners, who repeatedly had blockaded and/or

physically invaded clinics around the Commonwealth. A., I, 90-142. In October, 1990 the private plaintiffs (the "respondents") joined the Attorney General in filing a Joint Amended Complaint stating a single claim under the MCRA. Prior to trial, the respondents dropped their claim for damages and attorney's fees, and this case became primarily a civil enforcement action seeking a permanent, criminally enforceable injunction in accordance with Mass. Gen. L. ch. 12, §§ 11H-11J. A., I, 244-290. Copies of sections 11I and 11J are attached hereto as Appendix A.

In the 13-day bench trial, the Commonwealth and respondents offered

proof of nine occasions on which petitioners and others had blockaded and/or invaded abortion clinics in the Commonwealth. In prosecuting this action, the Commonwealth did not rely on, or even know the names of, women harmed by petitioners' actions. Rather, the Commonwealth's and respondents' evidence consisted of 22 non-patient witnesses (primarily police officers and clinic personnel) and well over 100 exhibits, including newsletters and other literature produced and distributed by Operation Rescue: Boston and P.L.A.N., A., III, 645-782; photographs and videotapes of each incident proven at trial, e.g., A.III, 581, 616, 634; selected bicycle locks

and homemade locks used by petitioners and others to lock themselves to clinic property, e.g., A., III, 588, 590, 619, 623; and redacted medical records establishing numbers of appointments, delays in service, and cancellations due to petitioners' activities, e.g., A.III, 604-612, 614-615, 624-627, 629-633, 641-644.

In 150 pages of findings and rulings, the Superior Court ultimately found all but one of the individual defendants liable under the MCRA. d., A., II, 504. On October 17, 1991, finding "overwhelming evidence of actions by the defendants which interfered with the ability of women to obtain abortions or related services at

abortion clinics in Massachusetts," d., A., II, 524, the Superior Court entered judgment for the Commonwealth and respondents. The Superior Court thereafter entered the Amended Permanent Injunction, the only relief sought below. Pet App. A.23-A.24.

During pre-trial discovery, only one defendant, Robert Delery, who was a party to neither the appeal nor this petition, sought to discover through interrogatories and document requests to the respondent clinics the identities of women scheduled to receive abortion services on the dates of the clinic blockades and invasions at issue. Much later, on the eve of trial, the petitioners, along with numerous other

non-appealing defendants, served a subpoena and at trial made oral requests for records identifying individuals prevented from receiving abortion services. These requests were denied by the Superior Court and upon interlocutory review to the state appellate courts. Pet. 4.

On appeal, the Supreme Judicial Court affirmed the judgment, the discovery and evidentiary rulings, and the Amended Permanent Injunction in their entirety. Pet. App. 16. In so ruling, the Supreme Judicial Court held that because the Attorney General had "special standing" to bring this action under state law, this case was properly analyzed as a civil public enforcement

action under the MCRA. This petition then followed.

REASONS FOR DENYING THE WRIT

For the reasons set forth below, the two Questions Presented here do not warrant review under Rule 10 of this Court's rules. Neither question rises to the level of an "important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). In addition, this Court lacks jurisdiction over Question No. 2.

I. THE DISPUTED DISCOVERY AND EVIDENTIARY RULINGS RAISE NO IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

According to the first Question Presented, the Supreme Judicial Court's

decision on the discovery and evidentiary issues "elevat[ed] clinic patients' rights to privacy above petitioners' rights to a fair trial . . . " Pet. i. The decision and the record below, however, do not support such a characterization of the narrow, fact-bound rulings made by the Supreme Judicial Court.

A. The Due Process Question Allegedly Raised by the Discovery and Evidentiary Rulings Was Secondary to the State Law Issues.

The Supreme Judicial Court primarily and appropriately analyzed the discovery and evidentiary dispute as it

had been briefed by the parties[1/] -- as a review of the trial judge's exercise of discretion over discovery and evidentiary disputes under state law. Specifically, the Supreme Judicial Court considered the relevance of the requested information and the likelihood that it would be favorable to the petitioners' defense to the MCRA claim, in light of the weight of the evidence adduced in support of the state civil rights claim. Pet. App. A.11-A.13. This determination was then balanced against the likelihood of intrusion on the patients' constitutional right to privacy. The court held:

[1/] The petitioners themselves devoted only four pages of their 60-page brief before the Supreme Judicial Court to the due process argument.

> Considering the likelihood that the defendants would obtain no evidence materially beneficial to them from women whose lives they intentionally and admittedly disrupted and further considering that disclosure of the identity of these women would intrude into their privacy on a matter of constitutional right, we conclude that the trial court did not abuse its discretion in denying disclosure of the identities of the women affected by the defendants' conduct.

Id., A.13-A.14. The Supreme Judicial Court relegated consideration of the federal due process argument to a single footnote, stating: "For the same reasons, rejection of defendants' discovery attempts did not deny them due process of law." Pet. App. A.14 n. 12.

The Supreme Judicial Court's treatment of the due process argument was entirely appropriate. At trial and

on appeal, the petitioners' only fair trial/due process argument was entirely congruent with their abuse of discretion argument. That is, the petitioners merely sought, and now seek, a fact-bound redetermination of the materiality of the information sought, in light of the evidence adduced at trial of the state law claim.

The first Question Presented, therefore, would have this Court correct the error allegedly made by the Superior Court. Merely arguing that the rulings below were wrong, however, does not justify plenary review by this Court. Sup. Ct. R. 10.1; see also Hamilton Show Co. v. Wolf Bros., 240 U.S. 251, 258 (1916); In re Woods, 143 U.S. 202,

206 (1892). Moreover, as set forth below, no such error was made. See argument II.B, infra.

B. Question 1 Presents No Unsettled Question of Federal Law.

Petitioners claim that the first Question Presented actually raises three unsettled sub-questions:

> what happens when these two rights [due process and privacy] conflict? Do the defendants, in preparing a defense to allegations that they threatened, intimidated or coerced women, have a right to confront the alleged victims and seek relevant information from them? Or, in the name of privacy, can the defendants be found liable under MCRA and be subjected to fines and prison sentences, without even learning whom they allegedly threatened, intimidated or coerced?

Pet. at 11.

Of these three broad questions, the third question, concerning liability under the MCRA, raises an issue under the state law, which does not fall within this Court's jurisdiction. The first and second questions also fail to qualify for review. Even assuming, without conceding, the legitimacy of the petitioners' claim that this case involves a "conflict"[2/] between due process and privacy, the Supreme

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2/Although the petition refers to a "conflict" between constitutional rights, it does not allege any "conflict" within the meaning of Rule 10 -- i.e., no determination of a federal question in a manner that conflicts with another state's highest court, a United States Court of Appeals, or a decision of this Court. Sup. Ct. R. 10.1 (b), (c). In fact, the petition fails to point to a single decision even arguably in conflict with the decision below.

Judicial Court's resolution of the due process claim raises no unsettled federal question about what happens when due process and privacy concerns allegedly conflict.

In fact, the stringent criminal due process analysis applied below has been well-settled for at least several years. In Pennsylvania v. Ritchie, 480 U.S. 39, 57-61 (1987), this Court considered whether the trial court's refusal to compel the Commonwealth of Pennsylvania to produce a confidential file on child abuse violated a criminal defendant's right to a fair trial under the Due Process Clause. The Court reaffirmed the already well-established test for evaluating such claims under the Due Process Clause:

> It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. . . . "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. at 57 (emphasis added)(citations omitted). The Court remanded the case for in camera inspection and a materiality determination by the trial court, but refused to allow defense counsel to review the file because of the need to respect the Commonwealth's "compelling interest in protecting its child-abuse information." Id. at 60.

As set forth below, the Supreme Judicial Court here applied the same,

well-established materiality test in rejecting the petitioners' challenge to the withholding of the patients' identities. In fact, the Supreme Judicial Court expressly relied on precedent citing and quoting the Pennsylvania v. Ritchie due process test. Pet. App. A.12-A.13. Accordingly, this Question Presented fails to raise any important, unsettled question of federal law.

II. THE PETITIONERS WERE AFFORDED DUE PROCESS AND A FAIR TRIAL.

A. If Anything, the Supreme Judicial Court Afforded Elevated Protection To Petitioners' Due Process Rights.

By applying the due process standards required in a criminal

proceeding like Pennsylvania v. Ritchie, the Supreme Judicial Court, if anything, applied a more stringent due process analysis than required in this civil action, thus ensuring that petitioners' rights were fully protected. Since in a criminal proceeding there would have been no right to the information sought by the petitioners, there certainly was no such right in this civil action.

B. Patient Identities Were Correctly Withheld under the Pennsylvania v. Ritchie Test for Materiality Under the Due Process Clause.

Even assuming the applicability of the criminal due process test here, the Supreme Judicial Court correctly held that under Pennsylvania v. Ritchie there

was no obligation to compel the information sought by petitioners since it was not "material" and unlikely to be favorable to their defense to the state law claim. Pet. App. A.11-A.13.

First, it is undisputed that the Commonwealth, on whose exclusive standing the Supreme Judicial Court decision was based,[3/] did not even have the information petitioners sought within its possession. As the unchallenged finding of the Supreme Judicial Court stated, the Attorney General "probably did not have any knowledge of which patients were

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3/The Supreme Judicial Court declined to address the standing of private respondents, and proceeded to analyze the case as if the Attorney General were the sole plaintiff. Pet. App. A.6- A.7 & n. 7, A.14 & n. 12.

affected by the defendants' conduct." Pet. App. A.12 n. 10.[4/]

In addition, petitioners have failed to demonstrate that obtaining patients' identities would have produced information both favorable and material

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[4/] For this reason, petitioners' analogy to cases involving use of confidential government informants fails. Pet. 17. First, clinic patients, who are not even known to the Commonwealth, did not supply the Commonwealth with any information relevant to the litigation here. Moreover, even in informant cases, the court must apply a balancing test, deciding "whether the party opposing the [government] privilege [to withhold confidential informants' identities'] has [a] credible need for the information in order to defend itself in the action -- a need greater than the important policy consideration underlying the privilege." Dole v. Local 1942, IBEW, 870 F.2d 368, 373 (7th Cir. 1989). Accord Roviaro v. United States, 353 U.S. 53, 60-61 (1957). As set forth infra, application of a similar materiality test demonstrated no such need here.

to their defense. At most, they claim that such disclosure would have assisted in identifying individual women who reacted positively to the petitioners' actions. Under state law, however, the Commonwealth's case neither required nor depended on the testimony of individual injured patients nor proof of subjective intent. Pet. App. A.11. Rather, state law has established that what constitutes "threats, intimidation or coercion" is determined with reference to an objective standard: that is, "whether a reasonable woman would have felt threatened, intimidated, or coerced by the defendants' conduct." Id.

In this case, moreover, there was no need even to reach the analysis of

patient reactions under the objective test. Petitioners never challenged the Superior Court's finding, upheld on appeal, that the petitioners' physical actions in blockading and invading clinics per se constituted "coercion," defined under state law as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." Pet. App. A.9. The findings of coercion constituted an independent and adequate basis for liability under the MCRA. See Pet. App. A.10. Since defendants' conduct per se resulted in "coercion" under the MCRA, there was no need to inquire into the nature of

patient reactions. The patient testimony sought by petitioners has no relevance to this coercion analysis.

Finally, even assuming that the petitioners' hypothesized reactions of clinic patients were relevant to determining whether a reasonable woman would have felt "threatened" or "intimidated," petitioners failed to show any likelihood that the result of the proceeding would have been different had disclosure been allowed. As the Supreme Judicial Court correctly held:

> Although the defendants' relevancy contention is theoretically sound, in the circumstances of this case, it lacks practical plausibility. The number of trespasses, the scores of scheduled abortions that were

> impeded, the physical intrusiveness of the blockaders, and the evidence of the reactions of patients and clinic personnel make it unlikely that the defendants would have discovered evidence from these women, whose lives they disrupted, that would have led the trial judge to factual conclusions other than those he reached. In other words, if there had been error on this issue, it would have created no reasonable risk that non-disclosure prejudiced the defendants.

Pet. App. A.12-A.13 (citing, inter alia, Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)).

Having concluded that the information sought was not "material" (and thus not subject to compulsory disclosure under Pennsylvania v. Ritchie), the Supreme Judicial Court could have ended its analysis there.

However, the Supreme Judicial Court went further, balancing the petitioners' weak showing of need against the "substantial" intrusion on patients' privacy rights that would have resulted from compelled disclosure. Pet. App. A.13-A.14. Because disclosure likely would have produced "no evidence materially beneficial to [the petitioners]," but would have "intrude[d] into [patients'] privacy on a matter of constitutional right," petitioners had no right to compelled disclosure under the Due Process Clause.

C. The Petitioners Had A Full Opportunity to Cross-Examine Adverse Witnesses And Confront the True Plaintiffs.

Petitioners also claim that the Supreme Judicial Court violated their

due process rights by "refusing to let the defendants know the identities of those making allegations against them," and by "preventing them from confronting the true plaintiffs." Pet. 15, 13. However, "the Commonwealth undertook to prove its case through non-patient witnesses who were present at the protests" and thus "assumed the task of proving threats, intimidation, and coercion without testimony from the women concerning their state of mind." Pet. App. A.9, A.13 (emphasis added). Petitioners thus cannot reasonably argue that they were unfairly denied the right to cross-examine or confront clinic patients at trial because those patients were simply not witnesses at trial. At

most, petitioners' claim amounts to a claim of a constitutional right to discovery. However, even in a criminal trial, "'[t]here is no general constitutional right to discovery.'" Pennsylvania v. Ritchie, 480 U.S. at 59-60 (citation omitted).

Moreover, petitioners did have the opportunity to, and did, cross-examine "those making allegations against them" -- the clinic personnel and the police. In addition, petitioners failed to take advantage of the numerous opportunities to challenge and defend against the allegations that their conduct was threatening, intimidating and coercive. They failed to depose clinic staff and police witnesses about their

observations of the clinic invasions and blockades, to seek redacted medical records which might have contained information on patient reaction and scheduling delays, and to call as friendly witnesses any of the "prayer supporters" or other sympathizers who attended these events.

The parties and the Superior Court, moreover, recognized throughout that <u>if</u> the respondents or the Commonwealth had intended to call any patient as a witness at trial, the petitioners would have had the right to depose the patient/witness before trial. This understanding was reflected in the Superior Court's protective order of March 7, 1991, requiring respondents

to notify petitioners "of the existence of any clinic patients who will be called as witnesses and to make them available for deposition by the defendants." A., II, 349-351 (emphasis supplied). Since no clinic patients were called at trial, none was required to be made available for deposition by the petitioners.

Finally, petitioners are incorrect in characterizing the decision below as shielding the identities of the "real" or "true" plaintiffs. Pet. 13, 19, No one disputes that under state law the Attorney General has standing to maintain this action as a plaintiff under Mass. Gen. L. ch. 12, § 11H. Section 11H grants the Attorney General

"special standing" to bring civil rights actions like this one "solely to protect against future unlawful conduct that would be harmful to persons not currently identifiable". Pet. App. A.14.

Accordingly, the Supreme Judicial Court correctly found that an action for injunctive relief, like this one brought by the Attorney General, is fundamentally different from a private claim for damages, in which counterbalancing privacy rights may be analyzed differently. As a result, the Supreme Judicial Court rejected as irrelevant the very cases cited again in this petition, National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272 (D. Conn. 1980) and Western Elec. Co., Inc.

v. Stern, 544 F.2d 1196 (3d Cir. 1976), stating:

> We need not reach the question whether affected women who bring an action have a constitutional right to have their identities (and the fact that they had been pregnant and decided to obtain an abortion) kept in confidence in an injunction case like this. If this were an action seeking relief for harm done to an individual plaintiff or to a class of plaintiffs, the defendants' entitlement to information about those individuals would be quite different from their entitlement here.

Pet. App. A. 14 n. 12 (citing Western Elec. and Sperry Rand). Accordingly, the Supreme Judicial Court correctly upheld the balance of due process and privacy rights struck below and found no violation of due process here.

III. THIS COURT LACKS JURISDICTION OVER THE SECOND QUESTION PRESENTED, WHICH NEITHER WARRANTS REVIEW BY THIS COURT NOR MAKES OUT A CLAIM UNDER THE FIRST AMENDMENT.

A. Petitioners Failed to Preserve Their Challenge Under the First Amendment.

The second Question Presented objects, on First Amendment grounds, to the wording of clauses (a) and (c) of the Amended Permanent Injunction, which forbid the petitioners and others "in active concert or participation with them" from "trespassing on, blocking or in any way obstructing access to abortion clinics." Pet. i. Although, as the petitioners state, this First Amendment argument was unsuccessfully raised in an earlier appeal to the Supreme Judicial Court, Planned

Parenthood League of Mass. v. Operation Rescue, 406 Mass. 701, 550 N.E.2d 1361 (1990), in the subsequent proceedings the petitioners failed adequately to raise the First Amendment objections raised here. At the trial level, the petitioners failed to raise any First Amendment objections to the wording of the injunction. In addition, on appeal to the Supreme Judicial Court, except for a cursory footnote referencing their earlier First Amendment argument, the petitioners raised a limited First Amendment challenge only to paragraph (c) of the injunction, enjoining them from "directing, instructing, conspiring with and/or [sic] aiding or abetting directly or indirectly any person,

persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b)." The Supreme Judicial Court, in a finding apparently unchallenged here, correctly noted that "the defendants did not raise it [their first amendment challenge to paragraph (c)] in the trial court," and "do not dispute the plaintiffs' assertion that the defendants had opportunities to raise this challenge and did not do so." Pet. App. A.15 n. 14. Although the Supreme Judicial Court nonetheless considered the issue and affirmed the wording of paragraph (c), the Question has not been adequately preserved for review by this Court.

B. The First Amendment Issue Is Neither Important Nor Unsettled And Was Correctly Decided by the Supreme Judicial Court.

Citing only to the dissent to the Supreme Judicial Court decision below, the petition resorts to an almost verbatim recitation of the dissent's objections to paragraphs (a) and (c). See Pet. App. A.17-A.18 (O'Connor, J., dissenting). Without citing a single federal case, or even mentioning the overbreadth doctrine, petitioners merely make the general claim that the injunction "offends the Constitution" because it will deter reasonable persons from joining others in a public way adjacent to a clinic and picketing, praying, chanting, and exhorting others

to accept their viewpoint. Pet. at 20-21. In addition, they claim, the inclusion of the term obstructing access "in any way" "must" be construed to include hindrance of access to clinics by nonphysical confrontation. Pet. at 21.

This Question, however, raises no important, unsettled federal question. Any First Amendment issue in this case was conclusively settled by Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994), which upheld an injunction including a 36-foot buffer zone, in which individuals were prohibited from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right of way around an

abortion clinic, because it "burdens no more speech than necessary to accomplish the governmental interest in providing access to the clinic and facilitating an orderly traffic flow on the street." Id. at 2528.

Before this broad injunction was upheld, the trial court in Madsen had issued what proved to be a less effective injunction, without a buffer zone, prohibiting inter alia, "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic." 114 S. Ct. at 2522 (emphasis added). This Court expressly noted that this original injunction (including the

"in any other manner" language) was "a much narrower injunction." Id. at 2527.

The injunction in this case, like the original injunction in Madsen, is much narrower than that including the 36-foot buffer zone, which the Court has found constitutionally permissible. It prohibits only those physical actions that directly prevent patients from gaining physical access to a clinic. It therefore burdens no more speech than necessary to accomplish the governmental interest in providing access to the clinics in Massachusetts.

Moreover, the petitioners have failed even to make out the basic elements of a challenge to the injunction under the First Amendment.

Rather, they ask this Court to invalidate the injunction based on the possibility that, at some future date, it may be incorrectly applied. This Court, however, refuses to invalidate injunctions based merely upon "an abstract controversy over the use of . . . words," such as petitioners urge here. 114 S. Ct. at 2530.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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Date: August 18, 1994

DP1/496

12:11I. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees.

Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

12:11J. Violations of constitutional rights; temporary restraining orders and injunctions; violations; punishment; vacation of order.

Section 11J. In actions brought pursuant to section eleven H or eleven I, whenever the court issues a temporary restraining order or a preliminary or permanent injunction, ordering a defendant to refrain from certain conduct or activities, the order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

After any such order has been served upon the defendant, any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both such fine and imprisonment; provided, however, that if bodily injury results from such violation, the violation shall be punishable by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

The clerk shall transmit two certified copies of each such order issued under section eleven H or eleven I to each appropriate law enforcement agency having jurisdiction over locations where such defendant is alleged to have committed the act giving rise to the action, and such law enforcement agency shall serve one copy of the order upon such defendant. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement agencies shall establish procedures adequate to ensure that all officers responsible for the enforcement of the order are informed of the existence and terms of such order. Whenever any law enforcement officer has probable cause to believe that such defendant has violated the provisions of this section, such officer shall have the authority to arrest said defendant.

Following the final disposition of a criminal contempt proceeding initiated by the attorney general for violation of an order issued in an action brought by the attorney general under section eleven H, the commonwealth shall move to dismiss any charges brought under this section against such defendant for such violation of the order.

Whenever the court vacates a temporary restraining order or a preliminary or permanent injunction issued under section eleven H or eleven I, the clerk shall promptly notify in writing each appropriate law enforcement agency which had been notified of the issuance of the order and shall direct each such agency to destroy all record of such vacated order, and such agency shall comply with such directive.